STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

FINAL STATEMENT OF REASONS AND UPDATED INFORMATIVE DIGEST

Subject Matter of Regulations: Utilization Review Enforcement

TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9792.11 – 9792.15

Section 9792.11	Investigation Procedures: Labor Code § 4610 Utilization Review Violations
Section 9792.12	Penalty Schedule for Labor Code § 4610 Utilization Review Violations
Section 9792.13	Assessment of Administrative Penalties – Penalty Adjustment Factors
Section 9792.14	Liability for Penalty Assessments
Section 9792.15	Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

UPDATED INFORMATIVE DIGEST

On February 7, 2007, the Supreme Court agreed to review the case entitled *Sandhagen v. WCAB and SCIF* (2006) 144 Cal. App. 4th 1050, 71 Cal. Comp. Cases 1541 (Supreme Court Number; 3 Civil No. C049286.) In *Sandhagen*, the Appellate Court held that although Labor Code section 4610 sets forth mandatory time frames for utilization review, it does not state that all medical treatment requests had to be subject to utilization review. *Sandhagen* stated that recourse is also provided under section 4062 "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610 ... ." (§ 4062, subd. (a).) Objections must be timely filed and are followed by a medical review. The medical review conducted under section 4062 differs from that conducted under section 4610. Under section 4062, the employee undergoes a comprehensive medical evaluation with a QME. The *Sandhagen* case is addressed by section 9792.11(f).

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code §11346.9(d), the Acting Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. The purposes and rationales for the regulations as set forth in the Initial Statement of Reasons continue to apply.

The regulation changes from the initially proposed regulations are summarized below.

THE FOLLOWING SUBDIVISIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A 15-DAY COMMENT PERIOD:

Modifications to Section 9792.11 Investigation Procedures: Labor Code § 4610 Utilization Review Violations

Subdivision (a) was amended to include a definition of "utilization review organization." The revision states: "'utilization review organization' includes any person or entity with which the employer, or an insurer or third party administrator, contracts to fulfill part or all of the employer's utilization review responsibilities under Labor Code section 4610 and Title 8 of the California Code of Regulations, sections 9792.6 through 9792.15." Labor Code section 4610(i) specifically provides authority to the Administrative Director to assess penalties against "the employer, insurer, or other entity subject to this section…" This definition was added to clarify the entities that are subject to utilization review investigations and penalties, and to allow the use of the term "utilization review organization" throughout the regulations without having to repeat the terms that encompass the definition.

Subdivision (b) was amended to delete references to the audit regulations. The references to the regulations were unnecessary and confusing. The word "process" was deleted from the phrase "utilization review process investigation." The change was made to be consistent with the use of the phrase "utilization review investigation" throughout the regulations.

Former subdivision (c) was deleted. The revised subdivision (c) sets forth the types of investigations that may be conducted: routine investigations and target investigation. It also divides how the investigations will occur depending on the investigation subject: the utilization review organization or the claims administrator. The revised subdivision states:

"(c) The Administrative Director, or his or her designee, may conduct a utilization review investigation at any location where Labor Code Section 4610 utilization review processes occur, as follows:

(1) For utilization review organizations:

(A) A Routine Investigation shall be initiated at each known utilization review organization at least once every three (3) years. The investigation shall include a review of a random sample of requests for authorization, as defined by section 9792.6(o), received by the utilization review organization during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation. The investigation may also include a review of any credible complaints received by the Administrative Director since the time of the previous investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of these regulations.

(B) Target Investigations:

1. A Return Target Investigation shall be conducted within 18 months of the date of the previous investigation of the same investigation subject if the performance rating was less than eighty-five percent.
2. A Special Target Investigation may be conducted at any time based on credible information indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12.
3. The Return Target Investigation and the Special Target Investigation may include (1) a review of the requests for authorization previously investigated which contained violations; (2) a review of the file or files pertaining to the complaint or possible violation; (3) a random sample of requests for authorization received by the utilization review organization during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation; (4) a sample of a specific type of requests for authorization; and (5) any credible complaints received by the Administrative Director since the time of any prior investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of these regulations.

(2) For a claims administrator:

(A) A Routine Investigation shall be initiated at each claims adjusting location at least once every five (5) years concurrent with the profile audit review done pursuant to Labor Code sections 129 and 129.5. The investigation shall include a review of a random sample of requests for authorization, as defined by section 9792.6(o), received by the claims administrator during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation. The investigation may also include a review of any credible complaints received by the Administrative Director since the time of the previous investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of these regulations.

(B) Target Investigations:

1. A Return Target Investigation shall be conducted within 18 months of the date of any previous investigation of the same investigation subject if the performance rating was less than eighty-five percent.
2. A Special Target Investigation may be conducted at any time based on credible information indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12.
3. The Return Target Investigation and the Special Target Investigation may include (1) a review of the requests for authorization previously investigated which contained violations; (2) a review of the file or files pertaining to the complaint or possible violation; (3) a random sample of requests for authorization received by the claims administrator during the three most recent full calendar months

preceding the date of the issuance of the Notice of Utilization Review Investigation; (4) a sample of a specific type of requests for authorization; and (5) any credible complaints received by the Administrative Director since the time of any prior investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of these regulations."

The Routine Investigation of the utilization review organization (URO) will be initiated at least once every three years. There are currently 86 UROs handling California workers' compensation utilization reviews. Therefore, the division will be conducting 2.4 URO investigations per month. The three year time period balances the importance of making sure that the UROs are following the utilization review requirements with the necessity of not occurring so often as to be overly disruptive to the business itself.

In contrast, the Routine Investigations of claims administrators will be initiated once every five years, concurrent with the PAR audit done pursuant to Labor Code section 129 and 129.5. There are approximately 500 claims adjusting locations in California and conducting the UR investigation at the same time as the PAR will be the most efficient for the investigatory staff and the claims adjusters' business management.

A Routine Investigation shall include a review of randomly selected requests for authorization, as defined by section 9792.6(o), received by the investigation subject during a three month calendar period. The investigation may also include a review of any credible complaints received by the Administrative Director since the time of the previous investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of the regulations. A Return Target Investigation shall be conducted within 18 months from the date of the previous investigation of the same investigation subject if the performance rating was less than eighty-five percent. The 18 month time frame will provide some flexibility in scheduling the return investigations depending on staffing and necessity to return promptly. A Special Target Investigation may be conducted at any time based on credible information indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.10. The Return Target Investigation and the Special Target Investigation may include (1) a review of the requests for authorization previously investigated which contained violations; (2) a review of the file or files pertaining to the complaint or possible violation; (3) a random sample of requests for authorization received by the utilization review organization during a three month calendar period; (4) a sample of a specific type of requests for authorization; and (5) any credible complaints received by the Administrative Director since the time of any prior investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director.

Subdivision (d) was added to set forth a statistically valid sample size for the randomly selected requests for authorization from a three month calendar period. This table was originally developed for the audit regulations (Title 8, California Code of Regulations,

section 10107.1(c)(1)) with the assistance of the Audit Simplification Subcommittee and Dr. Neil Maizlish, Research Manager for DWC. The numbers are based on an expected violation rate (expected frequency) not over 10%, reliability plus or minus 5%, and a confidence level of 80%. The sample size for each of the population ranges in the table was generated using a software program obtained from the Centers for Disease Control (CDC) called Epi Info (latest release is version 3.3.2). The application within the program used to generate the numbers is titled *Population Survey*, which is found under the Utilities Menu by selecting StatCalc, Sample Size & Power, Population Survey. The Epi Info software verifies an expected frequency of 10%, worst acceptable result of plus or minus 5%, and a confidence level of 80% for these numbers. Epi Info is public domain software that can be downloaded for free from the CDC's website at: http://www.cdc.gov/epiinfo/.

Subdivision (e) was added to set forth how complaints may be submitted and the location of the complaint form on the Division's website. The section also explains that complaints will be reviewed and investigated if necessary. This will prevent target investigations based on invalid complaints.

Subdivision (f) (originally subdivision (d)) was revised to provide that the penalties listed in section 9792.12 (a) (6) through (14) and (b) shall only be imposed if the request was subject to the Labor Code section 4610 utilization review process. This is necessary in light of the *Sandhagen* decision (*State Compensation Insurance Fund, Petitioner v. Workers' Compensation Appeals Board, (Sandhagen)* (2006) 144 Cal. App. 4th 1050 (currently pending before the Supreme Court), which provides that Labor Code section 4610 did not state that all medical treatment requests had to be subject to utilization review. *Sandhagen* holds that recourse is also provided under section 4062 "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610 ... ." (§ 4062, subd. (a).) Objections must be timely filed and are followed by a medical review. The medical review conducted under section 4062 differs from that conducted under section 4610. Under section 4062, the employee undergoes a comprehensive medical evaluation with a QME. This section was also revised to exempt employers who fall under Labor Code section 4600(d)(3) and (4).

Subdivision (g), originally part of subdivision (d), was revised to clarify which penalties will be assessed if the investigation is done concurrent with a Labor Code section 125 or 125.9 audit. Administrative penalties for utilization review process violations shall apply in lieu of the administrative penalties allowed under the audit regulations at section 10111.2. In addition, any report of findings from the investigation and any Order to Show Cause re: Assessment of Administrative Penalties prepared by the Administrative Director, or his or her designee, based on violations of Labor Code section 4610 or Title 8 of the California Code of Regulations sections 9792.6 through 9792.12, shall be prepared separately from any audit report or assessment of administrative penalties made pursuant to Labor Code section 129 and 129.5. The Order to Show Cause re: Assessment of Administrative Penalties for violations of sections 9792.6 et seq of Title 8 of the

California Code of Regulations shall be governed by the provisions sections 9792.11 through 9792.15.

Subdivision (h) was revised to delete the reference to California Code of Civil Procedure sections 1822.50 et seq, which allows for the issuance of an inspection warrant.

Subdivision (i) was amended to state that the proposed sections shall apply to investigations and conduct occurring on or after the effective date of the regulations.

Former subdivision (g) was deleted as it was replaced by the changes made to subdivision (c). Also, the references to the audit regulations were deleted as they were unnecessary and confusing.

Former subdivision (i) was deleted, as the employer's name is requested under revised subdivision (j).

Subdivision (j) was revised to describe the procedure when a utilization review organization or claims administrator is provided with notice of the investigation. The Notice of Utilization Review Investigation will be sent to the investigation subject with a list of the requested information. The information will allow the Administrative Director to create a list of randomly selected requests for authorizations and to determine how the utilization review process operates for the particular investigation subject. The subject is required to respond within 14 days. After reviewing the response, the Administrative Director will create a random sample of requests for authorization. That list will then be sent to the investigation subject. The subject will have an additional 14 days to produce the requests for authorization. At least 14 days notice will be provided before any on-site investigation. Subdivision (j) now states:

"(j) Unless the Administrative Director in his or her discretion determines that advance notice will render a Special Target or Return Target Investigation less useful, the claims administrator or utilization review organization shall be notified of its selection for an Investigation. Claims administrators and utilization review organizations shall be sent a Notice of Utilization Review Investigation. The Notice of Utilization Review Investigation shall require the investigation subject to provide the following.

(1) A description of the system used to identify each request for authorization (if applicable). To the extent the system identifies any of the following information in an electronic format, the claims administrator or utilization review organization shall provide in an electronic format a list of each and every request for authorization received at the investigation site during a three month calendar period specified by the Administrative Director, or his or her designee, and the following data elements: i) a unique identifying number for each request for authorization if one has been assigned; ii) the name of the injured worker; iii) the claim number used by the claims adjuster; iv) the initial date of receipt of the request for authorization; v) the type of review (expedited prospective, prospective, expedited concurrent, concurrent, retrospective, appeal); vi) the disposition (approve, deny, delay, modify, withdrawal); and, vii) if applicable, the type of person who withdrew the request (requesting physician, claims adjuster, injured

employee or his or her attorney, or other person). In the event the claims administrator or utilization review organization is not able to provide the list in an electronic format, the list shall be provided in such a form that the listed requests for authorization are sorted in the following order: by type of utilization review; type of disposition; and date of receipt of the initial request.

(2) A description of all media used to transmit, share, record or store information received and transmitted in reference to each request, whether printed copy, electronic, fax, diskette, computer drive or other media;

(3) A legend of any and all numbers, letters and other symbols used to identify the disposition (e.g. approve, deny, modify, delay or withdraw), type of review (expedited prospective, prospective, expedited concurrent, concurrent, retrospective, appeal), and other abbreviations used to document individual requests for authorization and a data dictionary for all data elements provided;

(4) A description of the methods by which the medical director for utilization review ensures that the process by which requests for authorization are reviewed and approved, modified, delayed, or denied is in compliance with Labor Code section 4610 and sections 9792.6 through 9792.10, as required by sections 9792.6(l) and 9792.7(b) of Title 8 of the California Code of Regulations;

(5) The following additional information, may be requested by the Administrative Director or his or her designee, as applicable to the type of entity investigated: i) whether utilization review services are provided externally; ii) the name(s) of the utilization review organization(s); iii) the name and address of the employer; and iv) the name and address of the insurer."

Current subdivision (k) sets forth that the claims administrator or URO must produce the requested information and provides that the Administrative Director shall provide the investigation subject with a Notice of Investigation that includes a list of randomly selected requests for authorization from a three month calendar period and complaint files. The purpose of this section to set forth the time frames and notice that the investigation subject shall receive regarding the investigation. The subdivision states:

"(k) The utilization review organization or claims administrator shall provide the requested information listed in subdivision (j) within fourteen (14) calendar days of receipt of the Notice of Utilization Review Investigation. Based on the information provided, the Administrative Director, or his or her designee, shall provide the claims administrator or utilization review organization, with a Notice of Investigation Commencement, which shall include a list of randomly selected requests for authorization from a three month calendar period designated by the Administrative Director and complaint files (if applicable), for investigation."

Current subdivision (l) and (m) were revised to separately address the UROs and the claims administrators regarding how the investigation will be conducted once the subject receives the Notice of Investigation. Because many UROs are out-of-state, UROs will

have 14 days to deliver copies of the records to the Administrative Director. The records must be accompanied by a statement attesting that the records are true and correct signed under penalty of perjury. The statement is required because records are easily altered or deleted. The determination of whether or not to assess UR penalties will be made based on a review of these records. If disputes occur regarding the assessment of penalties or if there are disputes regarding the events at issue, the records will be introduced as evidence at the administrative hearing. Subdivision (l) also states that if an onsite investigation is required, fourteen calendar days notice shall be provided to the utilization review organization. Subdivision (l) states:

"(l) For utilization review organizations: Within fourteen (14) calendar days of receipt from the Administrative Director, or his or her designee, of the Notice of Investigation Commencement, the utilization review organization shall deliver to the Administrative Director, or his or her designee, a true and complete copy of all records, whether electronic or paper, for each request for authorization listed. Copies of the records shall be delivered with a statement signed under penalty of perjury by the custodian of records for the location at which the records are held, attesting that all of the records produced are true, correct and complete copies of the originals, in his or her possession. After reviewing the records, the Administrative Director, or his or her designee, shall determine if an onsite investigation is required. If an onsite investigation is required, fourteen (14) calendar days notice shall be provided to the utilization review organization."

Subdivision (m) applies to claims administrators. The Notice of Investigation Commencement shall be provided to the claims administrator at least fourteen days prior to the commencement of the onsite investigation. Because the Routine Investigations are held concurrent with the PAR audits, the investigation will take place onsite. The claims administrator shall produce the records on site on the first day of the investigation. It also shall produce the records accompanied by a statement attesting that the records are true and correct signed under penalty of perjury. The statement is required because records are easily altered or deleted. The determination of whether or not to assess UR penalties will be made based on a review of these records. If disputes occur regarding the assessment of penalties or if there are disputes regarding the events at issue, the records will be introduced as evidence at the administrative hearing. Subdivision (m) states:

"(m) For claims administrators: The Notice of Investigation Commencement shall be provided to the claims administrator at least fourteen (14) calendar days prior to the commencement of the onsite investigation. The claims administrator shall produce for the Administrative Director, or his or her designee, on the first day of commencement of the onsite investigation, the true, correct and complete copies, whether electronic or paper, whether located onsite or offsite, of each request for authorization identified by the Administrative Director or his or her designee, together with a statement signed under penalty of perjury by the custodian of records for the location at which the records are held, attesting that all of the records produced are true, correct and complete copies of the originals."

Current subdivision (n) (former subdivision (l)) addresses additional procedures regarding the investigation. It states:

"(n) In the event the Administrative Director, or his or her designee, determines additional records or files are needed for review during the course of an onsite investigation, the claims administrator or utilization review organization shall produce the requested records in the manner described by subdivision 9792.11(k), within one (1) working day when the records are located at the site of investigation, and within five (5) working days when the records are located at any other site. Any such request by the Administrative Director, or his or her designee, also may include records or files pertaining to any credible complaint alleging violations of Labor Code sections 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations. The Administrative Director, or his or her designee, may extend the time for production of the requested records for good cause."

Current subdivision (o) explains how deadlines for utilization review processes are interpreted if the deadline falls on a weekend or holiday. The section was revised by excluding cases involving concurrent or expedited review (because those requests may have to be responded to within 72 hours), modifying the word "normal" with "business day," and referencing the definition as used in the utilization review regulation section 9792.9(a)(1).

Current subdivision (p) clarifies when a document shall be deemed received. The method set forth in section 9792.9(a)(2) shall apply except where the request for authorization is made through the mail and no proof of service exists or where the request for authorization is made by express mail, overnight mail or courier and there is no proof of service. These two exceptions are listed because they are not addressed in the utilization review. The time frames used for the U.S. postal service is based on the rule in the California Code of Civil Procedure. The sections are needed so there will not be dispute regarding whether a response to a request for authorization was timely.

Current subdivision (q) was revised state when the investigation subject will be provided with a copy of the complaint that triggered the Target Investigation. It states:

"(q) Upon initiating a Special Target Investigation, the Administrative Director, or his or her designee, shall provide to the claims administrator or the utilization review organization a written description of the factual information or of the complaint containing factual information or a copy of the complaint that triggered the utilization review investigation unless the Administrative Director or his or her designee determines that providing the information would make the investigation less useful. The claims administrator or utilization review organization shall have ten (10) business days upon receipt of the written description or copy of the complaint to provide a written response to the Administrative Director or his or her designee. After reviewing the written response, the Administrative Director, or his or her designee, shall either close the investigation without the assessment of administrative penalties or conduct further

investigation to determine whether a violation exists and whether to impose penalty assessments."

Current subdivision (r) provides how long records must be kept by the investigation subjects. Because UROs will be investigated at least once every three years, they must retain their records for three years. Because the audit regulations already provide record retention rules for claims administrators, the same rules will apply for their UR records. The sections states:

"(r) For utilization review organizations: The files and other records, whether electronic or paper, that pertain to the utilization review process shall be retained for at least three (3) years following either: i) the most recent utilization review decision for each injured employee, or ii) the date on which any appeal from the assessment of penalties for violations of Labor Code section 4610 or sections 9792.6 through 9792.12 is final, whichever date is later. Claims administrators shall retain their claim files as set forth in section 10102 of Title 8 of the California Code of Regulations."

Subdivision (s) addresses records that are created or help outside of California. It provides as follows:

"(s) For all files and other records pertaining to the employer's utilization review process, whether electronic or paper, that are created or held outside of California, upon receipt of a notice of Routine or Target Investigation or any other request from the Administrative Director, or his or her designee, to review such files or other records, the claims administrator or utilization review organization shall either deliver all such requested files and other records to an address in California specified by the Administrative Director, or his or her designee, or reimburse the Administrative Director for the actual expenses of each investigator who travels outside of California to the place where the records are held, including the per diem expenses, travel expenses and compensated overtime of the investigators."

Subdivision (t) explains what the preliminary investigation report is and provides for a conference to discuss the preliminary report if necessary. The conference allows the investigation subject to ask questions about the report and provide additional documentation or explanation, if necessary. These procedurse help resolve disputes. The subdivision states:

"(t) A preliminary investigation report will be provided to the claims administrator or utilization review organization. The preliminary investigation report shall consist of the preliminary notice of utilization review penalty assessments, the performance rating, and may include one or more requests for additional documentation or compliance. A conference to discuss the preliminary investigation report shall be scheduled, if necessary, within twenty-one calendar days from the issuance of the preliminary findings. Following the conference, the Administrative Director or his or her designee shall issue an Order to Show Cause Re: Assessment of Administrative Penalty (which shall include the final investigation report), as set forth in section 9792.15."

Subdivision (u) states the investigation subject may stipulate to the allegations and final report set forth in the Order to Show Cause.

Subdivision (v) requires the investigation subject to notify its clients about the results of the investigation. It states:

"(v) Within forty-five (45) calendar days of the service of the Order to Show Cause Re: Assessment of Administrative Penalties, if no answer has been filed, or within 15 calendar days after any and all appeals have become final, the claims administrator, or utilization review organization shall provide the following:
(1) A notice which shall include a copy of the final investigation report, the measures actually implemented to abate such conditions, and the website address for the Division where the performance rating and summary of violations is posted. If a hearing was conducted under section 9792.15, the notice shall include the Final Determination in lieu of the final investigation report.
(2) For utilization review organizations: the notice must be served on any employer or third party claims administrator that contracted with the utilization review organization and whose utilization review process was assessed with a penalty pursuant to section 9792.12, and any insurer whose utilization review process was assessed with a penalty pursuant to section 9792.12.
(3) For claims administrators: the notice must be served on any self-insured employer and any insurer whose utilization review process was assessed with a penalty pursuant to section 9792.12.
(4) The notice shall be served by certified mail.
(5) Documentation of compliance with this section shall be served on the Administrative Director within thirty calendar days from the date the notice was served."

The authorities were revised to include sections 11180 – 11191 of the Government Code. Sections 1822.50 et seq. from the Code of Civil Procedure were deleted from the reference because the sections were removed from the regulations.

Modifications to Section 9792.12 Penalty Schedule for Labor Code § 4610 Utilization Review Violations

Labor Code section 4610(i) authorizes the assessment of penalties. The amount of the penalties listed in this section are based on various factors. The analysis below sets forth the legal standard for civil penalties:

In each of the following cases, the court considered the issue of whether a civil penalty that has been imposed is unconstitutional. In general, penalties are found to be constitutional where various factors are considered including; 1) degree of culpability, 2) prior misconduct, 3) the concern of creating a financial bonanza that would ill serve public policy, and 4) the sophistication and financial strength of the assessed. "Legislature may constitutionally impose reasonable penalties to secure obedience to statutes enacted under the police power so long as those enactments are procedurally fair

and reasonably related to a proper legislative goal." Kinney v. Vaccari (1980) 27 Cal.3d 348, 352.

In Hale v. Morgan (1978) 22 Cal.3d 388, the Supreme Court analyzed former Civil Code §789.3, which authorized a penalty of $100 per day against a landlord who wilfully deprived a tenant of utility services for the purpose of evicting the tenant. The defendant in Hale was a cable television installer, who owned a small mobile home park and rented spaces to four or five mobile homes. Plaintiff moved a mobile home into the park without defendant's consent and then, after negotiating a small monthly rental, failed to pay rent for several months. When the defendant retaliated by cutting off his water and electrical lines, plaintiff filed an action for statutory penalties under section 789.3. The trial court found that defendant had wilfully cut off utility services for 173 days and imposed penalties in the amount of $17,300. The monthly rental, however, was only $65, or $780 per year. The Supreme Court concluded that under the circumstances in this case, the penalties were excessive and therefore, violated the due process provisions of the Constitution. The amount of the penalty was not discretionary and did not take into account any ameliorating factors (such as degree of culpability, prior misconduct, ability to pay, effect on business and such other matters as justice may require.) The statute also "permits the occasional experienced and designing tenant to ambush an unknowing landlord converting the single wrongful act of the latter into a veritable financial bonanza." Id. Additionally, the fixed penalties were imposed upon potential defendants who may vary greatly in sophistication and financial strength. On the factor of financial circumstances, the Hale court faulted the discretion less penalty for former section 789.3 in part because: "A large corporate landlord which callously and by design pursues a policy of 'shock' eviction suffers no greater penalty than the elderly widow of modest means who, dependent on the income of a single unit, ignorant of the penalty procedures of the law, exhausted by the machinations of a wily and recalcitrant tenant, and no longer willing or able to bear the expense of utilities for an occupant who refuses to pay rent, finally terminates the tenant's utility services in order to speed his departure." Hale, supra, 22 Cal.3d at pp. 399-400.

In contrast, the court in Kinney v. Vaccari (1980) 27 Cal.3d 348, found penalties of $36,000 applied under the same statute as discussed in Hale to be, "both proportioned to the landlord's misconduct and necessary to achieve the penalty's deterrent purposes," and therefore not constitutionally excessive. The differences in this case from Hale were: (1) the landlord in Kinney had little or no provocation for his conduct; (2) the tenants made an effort to mitigate damages by tendering their rent payments; and (3) the landlord's conduct in this case was egregious. He turned off the utilities in an extremely harsh winter, depriving the tenants of hot water, heat and cooking facilities. Seven of the plaintiffs were minors and one gave birth during the time period. Finally, (4) the amount of the penalty could not be called confiscatory. It did not exceed the value of the premises.

In City and County of San Francisco v. Sainez (2000) 77 Cal. App. 4th 1302, the owners of multi-unit rental property argued that the civil penalties assessed against them for violations of the housing and building codes violated their due process and excessive-

fines protections of the state and federal Constitution. The owners due process challenge was based on Hale v. Morgan, supra, 22 Cal.3d 388. The city relied upon Kinney v. Vaccari, supra. Although the owners argued that the $1000 a day fine was more draconian than the fine in Hale, the court points out that the $1000 a day fine is comparable to the $600 a day ($100 times the six units) upheld as reasonable in Kinney, two decades ago, for the same number of units. In the Sainez case, the penalties are paid to the City, as opposed to tenants, and therefore there is no concern of penalties creating a "veritable financial bonanza" that ill-serves public policy. Also served is the legitimate police power device of 'securing obedience" to the code requirements through penalties. Further, although the trial judge expressed concern that an accumulated penalty might, be too severe in light of a defendant's overall culpability and financial circumstances, the total here was not impermissibly disproportionate "to the conduct" or to defendants' "net worth." In Sainez, the defendants owned 14 rental properties, had a yearly rental income of $276,000, and could be characterized as sophisticated in their dealings with the City and property management. As stated in Sainez, "while neither Hale nor Kinney considered or had evidence of total net worth, both decisions suggest that net worth can bear on the due process question." Id.

Finally, in Ojavan Investors, Inc. v. California Coastal Commission (1997) 54 Cal.App.4th 373, real estate investment corporations argued that a fine of almost $10 million was excessive. The statute in this case gave the trial court some discretion in determining the amount of the fines. The trial court considered five factors: (1) the nature, circumstance, extent, and gravity of the violation; (2) whether the violation was susceptible to restoration or to other remedial measures; (3) the sensitivity of the resource affected by the violation; (4) the cost to the state of bringing the action; and (5) with respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any resulting from or expected to result as a consequence of the violation, and such other matters as justice may require. Among the factors the trial court found to be egregious were defendants' culpability and the profits made and expected to be made. Distinguishing this statute from the one analyzed in Hale, the court pointed out that the trial court considered five factors listed above and that the consideration of the ameliorating factors distinguished the statute from the one in Hale. The fines were proportionate to the number of violations and to the defendants' flagrant disregard for the law.

Here, the penalties will be assessed against claims administrators and UROs. The claims administrators' and UROs' profits are related to how claims are handled and to costs expended in reviewing requests for authorization for medical treatment. Those who are affected by their decisions are injured workers. The regulations allow for mitigation, abatement and waiver of the penalties.

Subsection 9792.12(a) was revised to increase in the penalties for the single instance violations. The violations were re-written so that they all follow the same sentence structure beginning with "For failure to…" The penalty amounts are listed after each violation and although the amounts cannot be waived, they may be mitigated pursuant to section 9792.13. When possible, the subdivisions were simplified by referencing the UR

regulations that was violated instead of repeating the requirements set forth in the UR regulations. The (a) violations are more severe UR violations than those listed under subdivision (b). Subdivision (a) is set forth below, which explanatory comment in brackets under each subdivision:

(1) For failure to establish a Labor Code section 4610 utilization review plan: $50,000;

[This is the most egregious violation – the complete failure to establish a plan as required by Labor Code section 4610. Failure to establish a UR plan is a flagrant disrespect for the law that has been in effect since 2003.]

(2) For failure to include all of the requirements of section 9792.7(a) in the utilization review plan: $5,000;

[This penalty is less severe, as the plan has been established, but is missing one or more of the required components. The DWC medical unit has reviewed all UR plans on file and has provided feed back regarding any plan that is not in compliance with the statute and regulations.]

(3) For failure to file the utilization review plan or a letter in lieu of a utilization review plan with the Administrative Director as required by section 9792.7(c): $10,000;

[This violation is less severe than failing to have established a plan.}

(4) For failure to file a modified utilization review plan with the Administrative Director within 30 calendar days after the claims administrator makes a material modification to the plan as required by section 9792.7(c): $5,000;

[This violation is less severe than the violation listed in (a)(3).]

(5) For failure to employ or designate a physician as a medical director, as defined in section 9792.6(l), of the utilization review process, as required by section 9792.7(b): $50,000;

[Failure to have a medical director is one of the most severe violations possible. Additionally, unless the penalty is severe, it would be less expensive to violate the requirement to have a medical director than to be assessed with even multiple violations.]

(6) For issuance of a decision to modify or deny a request for authorization regarding a medical treatment, procedure, service or product where the requested treatment, procedure or service is not within the reviewer's scope of practice (as set forth by the reviewer's licensing board): $25,000;

[A definition for "scope of practice" was added for clarity: "as set forth by the reviewer's licensing board." The words "or professional competence" were deleted because determining the professional competence of a physician would require more than a review of the UR records. It would require a factual determination that may only be made after a deposition is conducted. It is intended that the UR investigations proceed quickly without protracted discovery beyond reviewing documents. The penalty amount is $25,000, as it is not as severe as the failure to have a medical director.]

(7) For failure to comply with the requirement that only a licensed physician may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure or relieve, except as provided for in Labor Code section 4604.5(d) and section 9792.9(b)(2) and (3): $25,000;

[Subdivision (a)(7) was revised to state "cure or relieve" instead of "cure and relieve" to be consistent with Labor Code section 4600, *United States Fidelity and Guaranty Company v. DIR* (1929) 207 Cal. 144, and *Grom v. Shasta Wood Products* (2004) 69 Cal. Comp. Cases 1567. Reference to Labor Code section 4604.5(d) is added to allow for the denial if the request is beyond the cap of 24 chiropractic, occupational therapy or physical therapy visits. The citation to section 9782.9 is corrected to 9792.9. The severity of this violation is similar to (a)(6), and therefore the penalty amount is the same.]

(8) For failure of a non-physician reviewer (person other than a reviewer, expert reviewer or medical director as defined in section 9792.6 of Title 8 of the California Code of Regulations), who approves an amended request to possessing an amended written request for treatment authorization as provided under section 9792.7(b)(3) when a physician has voluntarily withdrawn a request in order to submit an amended request: $1,000;

[The penalty amount in subdivision (a)(8) was reduced from $25,000 to $1,000 because unlike the other $25,000 penalty violations, in this case the request was approved and the failure is due to lack of documentation. This re-written version does not require the non-physician review to possess the written amended request prior to approving the request. However, in order to comply with Labor Code section 4610(e) and 9792.7(b)(3), the file must contain a written amended request.]

(9) For failure to communicate the decision in response to a request for an expedited review, as defined in section 9792.6(g), in a timely fashion, as required by section 9792.9: $15,000;

[An expedited review is defined by section 9792.6(g) and means utilization review conducted when the injured worker's condition is such that the injured worker faces an imminent and serious threat to his or her health. Therefore, the failure to timely respond to such a request is a serious violation. The penalty amount for this violation is $15,000.]

(10) For failure to approve the request for authorization solely on the basis that the condition for which treatment was requested is not addressed by the medical treatment utilization schedule adopted pursuant to section 5307.27 of the Labor Code: $5,000;

[Compared to the other violations in this (a) subdivision, the violation is less severe, and the penalty amount is $5,000.]

(11) For failure to discuss or document attempts to discuss reasonable options for a care plan with the requesting physician as required by Labor Code section 4610(g)(3)(B), prior to denying authorization of or discontinuing medical care, in the case of concurrent review: $10,000;

[Subdivision (a)(11) is revised to also include the words "or document attempts to discuss … with the requesting physician." Therefore, if the investigation subject tried to contact the requesting physician but was unable to and documented the attempts, the penalty will not be imposed. The term "good faith" has been removed, as it was not defined in the utilization review regulations. The penalty amount is $10,000,

as the failure to discuss reasonable options for a care plan prior to discontinuing medical care of a hospitalized injured worker is a serious violation.]

(12) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a non-expedited concurrent review: $2,000;

[Subdivisions (a)(12) through (a)(14) address the failure to respond to the request for authorization by the injured employee's treating physician. The penalties are structured based on the type of review: $2,000 for a non-expedited prospective review; $1,000 for a non-expedited prospective review; and $500 for a retrospective review.]

(13) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a non-expedited prospective review: $1,000;

(14) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a retrospective review: $500;

(15) For failure to disclose or otherwise to make available, if requested, the Utilization Review criteria or guidelines to the public, as required by Labor Code section 4610, subdivision (f)(5) and section 9792.7(d) of Title 8 of the California Code of Regulations: $100.

[Subdivision (a)(15) has been moved from subdivision (b). It is a $100 penalty for failing to disclose or otherwise make available, upon request, the Utilization Review criteria to the public. The violation was moved to this section, as it is not the type of violation that would be discoverable during a review of the requests for authorization.]

(16) For failure to timely serve the Administrative Director with documentation of compliance pursuant to section 9792.11(v): $500.

[This penalty was added to because the final investigation report may require the investigation subject to provide documentation of compliance. The penalty will provide motivation for the investigation subject to comply with the requirement.]

(17) For failure to timely comply with any compliance requirement listed in the Final Report if no timely answer was filed or the Determination and Order after any and all appeals have become final: $500.

[This penalty is added to because the final investigation report may require the investigation subject to perform certain remedial actions – such as correct a notice. The penalty will provide motivation for the investigation subject to comply with the requirement.]

Former subdivision (a)(11) is deleted. The violations are now covered by (a)(3) and (a)(4).

Subdivision (b) was completely revised. Generally, the listed violations are the same as previously listed, but have been re-worded for clarity and have a flat rate penalty amount instead of an increasing amount depending on the number of violations. The penalties amounts are either $100 or $50 each. The penalty amounts are less severe than the (a) penalties because they address violations for failures to make or provide timely

responses, faulty notice content and failures to issue notices to all of the appropriate parties. Subdivision (b)(1) provides that the investigation subject's performance rating will be determined and if the subject's performance rating is 85% or better, the penalties amounts listed in subdivision (b) will not be assessed. This will allow the UROs and claims administrators a small margin for errors, but still require generally good performance. This section was added to mirror the profile audit review procedure where no penalties are assessed if a claims administrator passes the performance standard. (Labor Code section 129(b)(1).) How the performance rating is calculated is set forth in (b)(1).

Additionally, if the investigation subject does not meet or exceed the 85% performance standard, (b)(2) provides for a waiver of penalties for the violations listed in 9792.12(b) if the investigation subject agrees in writing to:

"(A) Deliver to the Administrative Director, or his or her designee, within no more than thirty (30) calendar days from the date of the agreement or the number of days otherwise specified, written evidence, tendered with a declaration made under penalty of perjury, that explains or demonstrates how the violation has been abated in compliance with the applicable statute or regulations and the terms of abatement specified by the Administrative Director; and
(B) Grant the Administrative Director, or his or her designee, entry, upon request and within the time frame specified in the agreement, to the site at which the violation was found for a Return Target Investigation for the purpose of verifying compliance with the abatement measures reported in subdivision 9792.12(b)(1)(A) above and agrees to a review of randomly selected requests for authorization; and
(C) Reinstatement of the penalty amount previously waived for each such instance, in the event the violative condition is not abated within the time period specified by the Administrative Director, or his or her designee, or in the event that such abatement measures are not consistent with abatement terms specified by the Administrative Director, or his or her designee."

Subdivision (b)(3) explains how the penalties will be increased upon return investigations. It states:

"(3) In the event the Administrative Director, or his or her designee, returns for a Return Target Investigation, after the initial violation has become final, and the subject fails to meet the performance standard of 85%, the amount of penalty shall be calculated as described below and in no event shall the penalty amount be waived:
(A) The penalty amount for each violation shall be multiplied by two for a second investigation, but in no event shall the total penalties for the violations exceed $100,000;
(B) The penalty amount for each violation shall be multiplied by five for a third investigation, but in no event shall the total penalties for the violations exceed $200,000;
(C) The penalty amount for each violation shall be multiplied by ten for a fourth investigation, but in no event shall the total penalties for the violations exceed $400,000."

The penalties are set forth in (b)(4) and (b)(5). They are as follows:

"(4) For each of the violations listed below, the penalty amount shall be $100.00 for each instance found by the Administrative Director, or his or her designee:

(A For failure to immediately notify all parties in the manner described in section 9792.9(g)(2) of the basis for extending the decision date for a request for medical treatment;

(B) For failure to document efforts to obtain information from the requesting party prior to issuing a denial of a request for authorization on the basis of lack of reasonable and necessary information;

(C) For failure to make a decision to approve or modify or deny the request for authorization, within five (5) working days of receipt of the requested information for prospective or concurrent review, and to communicate the decision as required by section 9792.9(g)(3);

(D) For failure to make and communicate a retrospective decision to approve, modify, or deny the request, within thirty (30) working days of receipt of the information, as required by section 9792.9(g)(4);

(E) For failure to include in the written decision that modifies, delays or denies authorization, all of the items required by section 9792.9(j);

(F) For failure to disclose or otherwise to make available, if requested, the Utilization Review criteria or guidelines, to the injured employee whose case is under review, as required by Labor Code section 4610(f)(5) and section 9792.8(a)(3) Title 8 of the California Code of Regulations.

(5) For each of the violations listed below, the penalty amount shall be $50.00 for each instance found by the Administrative Director, or his or her designee:

(A) For failure by a non-physician or physician reviewer to timely notify the requesting physician, as required by section 9792.9(b)(2), that additional information is needed in order to make a decision in compliance with the timeframes contained in section 9792.9(b);

(B) For failure to communicate the decision to approve to the requesting physician in the case of prospective or concurrent review, by phone or fax within 24 hours of the decision, as required by Labor Code section 4610(g)(3)(A) and in accordance with section 9792.9(b)(3) of Title 8 of the California Code of Regulations;

(C) For failure to send a written notice of the decision to modify, delay or deny to the requesting party, and to the injured employee and to his or her attorney if any, within twenty four (24) hours of making the decision for concurrent review, or

within two business days for prospective review, as required by Labor Code section 4610(g)(3)(A) and section 9792.9(b)(4) of Title 8 of the California Code of Regulations;

(D) For failure to communicate a decision in the case of retrospective review as required by section 9792.9(c) within thirty (30) days of receipt of the medical information that was reasonably necessary to make the determination;

(E) For failure to provide immediately a written notice to the requesting party that a decision on the request for authorization cannot be made within fourteen (14) days for prospective and concurrent reviews, or within thirty (30) days for retrospective in accordance with section 9792.9(g)(2);

(F) For failure to document that one of the following events occurred prior to the claims administrator providing written notice for delay under Labor Code section 4610(g)(5):

1) the claims administrator had not received all of the information reasonably necessary and requested;
2) the employer or claims administrator has requested a consultation by an expert reviewer;
3) the physician reviewer has requested an additional examination or test be performed;

(G) For failure to explain in writing the reason for delay as required by section 9792.9(g)(2) of Title 8 of the California Code of Regulations when the decision to delay was made under one of the circumstances listed in section 9792.9(g)(1)."

Subdivision (b)(6) provides that after the time to file an answer to the Order to Show Cause Re: Assessment of Administrative Penalties has elapsed and no answer has been filed or after any and all appeals have become final, the Administrative Director, or his or her designee, shall post on the website for the Division of Workers' Compensation the performance rating and summary of violations for each utilization review investigation. This will allow the public to see the results of the UR investigations. No personal medical information will be included in the performance rating or summary of violations.

Subdivision (c) advises that the penalty amounts listed in subdivision (a) and (b) may be reduced based on section 9792.13, and that failure to abate a violation will result in the assessment of the full original penalty amount.

Modifications to Section 9792.13 Assessment of Administrative Penalties – Penalty Adjustment Factors

Subdivision (a) is revised to replace the word "cases" with "any case." The word "mitigated" replaced "adjust" as the factor will only reduce a penalty amount.

Subdivision (a)(2) was added to state: "(2) The good faith of the claims administrator or utilization review organization. Mitigation for good faith shall be determined based on documentation of attempts to comply with the Labor Code and regulations and shall result in a reduction of 20% for each applicable penalty;" This subdivision is modeled after the audit regulations section 10111.2(c)(4).

Subdivision (a)(3) was simplified.

Subdivision (a)(4), (a)(5), and (a)(6) were deleted. A new subdivision (a)(4) was added which states: "The frequency of violations found during the investigation giving rise to a penalty." This is a better measure than the number and type of the violations (deleted (a)(4)). Subdivision (a)(5) was added. It states: (5) Penalties may be mitigated outside the above mitigation guidelines in extraordinary circumstances, when strict application of the mitigation guidelines would be clearly inequitable." This same mitigation factor was part of the audit regulations. It can be applied in situations such as when natural disasters destroy records.

Subdivision (a)(6) was added to state: "(6) In the event an objection or appeal is filed pursuant to subsection 9792.15 of these regulations, whether the claims administrator or utilization review organization abated the alleged violation within the time period specified by the Administrative Director or his or her designee."

Former subdivision (b) was deleted as it no longer applied due to the revision made to section 9792.12(b).

Subdivision (c) was added to state: "(c) The Administrative Director, or his or her designee, shall not collect payment for an administrative penalty under Labor Code section 4610 from both the utilization review organization and the claims administrator for an assessment based on the same violation(s)."

Subdivision (d) was revised to include the URO in the first sentence and to add the second sentence. It now states: "(d) Where an injured worker's or a requesting provider's refusal to cooperate in the utilization review process has prevented the claims administrator or utilization review organization from determining whether there is a legal obligation to perform an act, the Administrative Director, or his or her designee, may forego a penalty assessment for any related act or omission. The claims administrator, or utilization review organization shall have the burden of proof in establishing both the refusal to cooperate and that such refusal prevented compliance with the relevant applicable statute or regulation." If the investigation subject contends that no penalty should be imposed because of failure to cooperate, it must be able to prove the defense with file documents or other evidence.

Modifications to Section 9792.14 Liability for Penalty Assessments

Subdivision (a) was revised to include the term "utilization review organization." The words "or audited" were deleted as unnecessary.

Subdivision (b) is revised to include the term "utilization review organization." Syntax changes were made for clarity. The words "or audited" were deleted as unnecessary.

Subdivision (c) is revised to include the term "utilization review organization." The phrase "or other person that is was cited by the Administrative Director for violations of Labor Code section 4610 or sections 9792.6 through 9792.12" is deleted. The words "or person" and "for an employer" are added. Syntax changes were made for clarity.

Modification to Section 9792.15 Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

Subdivision (a) was revised to remove reference to the Notice of Hearing.

Subdivision (b) was revised to replace the word "contain" with the word "include."

Subdivision (b)(2) was clarified by adding the words "final investigation report, which shall include the ..." The final report, which will be prepared by the investigatory unit, is now described as: "The final investigation report, which shall consist of the notice of utilization review penalty assessment, the performance rating, and may include one or more requests for documentation or compliance."

Subdivision (d) is revised to include the term "utilization review organization." The word "alleged" is removed form (d)(3). The sentence "Any allegation and proposed penalty stated in the Order to Show Cause that is not contested shall be paid within thirty (30) calendar days after the date of service of the Order to Show Cause" is deleted, as it re-written as subdivision (e).

Subdivision (e) is added to state: "(f) Any allegation and proposed penalty stated in the Order to Show Cause that is not appealed shall be paid within thirty (30) calendar days after the date of service of the Order to Show Cause."

The remaining subdivisions are re-lettered.

In subdivision (f), "cause" is capitalized.

Subdivision (g) was revised to replace the words "employer, insurer or other entity…" with the term "utilization review organization." The last sentence, "In the event the respondent is not the employer, the employer's address shall be provided and the employer shall be included on the proof of service," is deleted. The requirement to advise the parties that contracted with the investigation subject is set forth in section 9792.11(v).

Subdivision (h) provides when the Notice of Hearing will issue: "Within sixty (60) calendar days of the issuance of the Order to Show Cause Re: Assessment of

Administrative Penalty, the Administrative Director shall issue the Notice of the date, time and place of a hearing. The date of the hearing shall be at least ninety calendar days from the date of service of the Notice. The Notice shall be served personally or by registered or certified mail. Continuances will not be allowed without a showing of good cause." The following subdivisions are re-lettered.

In subdivision (j), "charges" is replaced with violations, as the final report has already issued.

The syntax in subdivision (k) is corrected.

In subdivision (l), the word "reasonable" is replaced with "sixty (60) calendar days" for clarity and to assure the parties of adequate notice before the pre-hearing conference.

Subdivision (m)(4) is revised to include the words "the" and "of witnesses."

Subdivision (o) is revised to include the word "thirty." A "d" is added to "designate" in the second to last sentence.

In subdivision (q)(4) the word "upon" replaced the word "over."

Subdivision (r) is revised. The reference to section 9792.13(m) was corrected to 9792.15(n). The words "twenty" and "ten" were added. The following sentences are added: "Upon timely demand for production of a witness in lieu of admission of an affidavit or declaration, the proponent of that witness shall ensure the witness appears at the scheduled hearing and the proffered declaration or affidavit from that witness shall not be admitted. If the Administrative Director, or the designated hearing officer, determines that good cause exists that prevents the witness from appearing at the hearing, the declaration may be introduced in evidence, but it shall be given only the same effect as other hearsay evidence." This language was added because if there is good cause that prevents the witness from testifying, this will allow the declaration to be introduced with the same effect as other hearsay evidence.

In re-lettered subdivision (s), the word "Recommended" is deleted and the word "sixty" is added.

Subdivision (t) was revised. The words "Administrative Director or the" are added in case the Administrative Director issued the recommended Determination and Order. The subdivision is also revised to include the words "signed and served by the Administrative Director, or his or her designee." The following sentence is added for clarity: "If the Administrative Director does not act within sixty (60) calendar days, then the recommended Determination and Order shall become the Determination and Order on the sixty-first calendar day." The word "Final" has been deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal has elapsed).

Subdivision (u) was added. It states: "The Determination and Order Assessing Penalty shall be served on all parties personally or by registered or certified mail by the Administrative Director." This is added to ensure the parties receive the Determination and Order and to clarify that it is the Administrative Director's responsibility to serve the Determination and Order.

Subdivision (v) was revised for clarity. The word "Final" was deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal has elapsed). The phrase "for the purposes of review within twenty (20) days of" was deleted, as it was contradictory with the phrase that followed and did not make sense when read with the timeframe in which to appeal. The word "the" is inserted in the phrase "Petition Appealing the Determination and Order." The word "was" was replaced with "were."

In subdivision (w), the word "Final" has been deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal has elapsed). The phrase "or amend the Final Determination and Order for good cause" was deleted as it was vague. An "(s)" was added to the end of "error."

In subdivision (x), the word "Final" was deleted and the word "the" is inserted in the phrase "Petition Appealing the Determination and Order."

In subdivision (y), the word "Final" has been deleted from modifying "Determination and Order" and the word "the" is inserted in the phrase "Petition Appealing the Determination and Order."

THE FOLLOWING NON-SUBSTANTIVE CHANGE WAS MADE AND NOT CIRCULATED FOR A 15 DAY COMMENT PERIOD:

In section 9792.11(e), the division's post office box was corrected. The current P.O. Box is P.O. Box 71010, Oakland, CA 94612. The section now states:

"(e) Complaints concerning utilization review procedures may be submitted with any supporting documentation to the Division of Workers' Compensation using the complaint form that is posted on the Division's website at:
http://www.dir.ca.gov/dwc/FORMS/UtilizationReviewcomplaintform.pdf
Complaints should be mailed to DWC Medical Unit-UR, P.O. Box 71010, Oakland, CA 94612, attention UR Complaints or emailed to DWCManagedCare@dir.ca.gov.
Complaints received by the Division of Workers' Compensation will be reviewed and investigated, if necessary, to determine if the complaints are credible and indicate the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12."

UPDATE OF MATERIAL RELIED UPON

No additional documents beyond those identified in the Initial Statement of Reasons and Notices of Revisions were relied upon by the Administrative Director.

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

CONSIDERATION OF ALTERNATIVES

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Acting Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective as and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the charts contained in the rulemaking binder.

The public comment periods were as follows:

Initial 45-day comment period: April 27, 2006 through June 29, 2006

First 15-day comment period: November 21, 2006 through December 12, 2007.

Second 15-day comment period: February 7, 2007 through February 22, 2007.

Third 15-day comment period: March 9, 2007 through March 24, 2007.

Fourth 15-day comment period: March 21, 2007 through April 5, 2007.